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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARTSELL GRAY, County Treasurer of Harris County, Texas (Henry E. Kriegel, successor in office),
Petitioner

v.

GARY JOHN VAN OOTEGHEM,
Respondent

PETITION FOR A WRIT OF CERTIORARI
From the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1) DOES AN EMPLOYEE HAVE A CONSTITUTIONAL RIGHT TO MAKE A SPEAKING APPEARANCE BEFORE A GOVERNMENTAL BODY FOR HIS OWN PERSONAL PURPOSES, AT THE EMPLOYER'S EXPENSE?

2) CAN HARRIS COUNTY BE BOUND TO SATISFY THE JUDGMENT AGAINST ITS COUNTY TREASURY, EVEN THOUGH HARRIS COUNTY WAS NOT A PARTY TO THE SUIT?

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PETITION FOR A WRIT OF CERTIORARI
From the Fifth Circuit

OPINIONS DELIVERED IN COURTS BELOW

On March 20, 1978, the District Court filed an unreported Memorandum and Order (App. A-1) holding that petitioner County Treasurer had fired his Assistant Treasurer, respondent Van Ooteghem, in violation of his First Amendment rights, and ordered the County Treasurer to reinstate his Assistant with back pay.

On September 29, 1978, the District Court filed an unreported Memorandum and Order (App. B-1) holding that the judgment in this case must be against the County Treasurer in his official capacity only, and deny-

ing a motion to reopen the case to receive additional evidence.

On November 20, 1978, the District Court filed an unreported Memorandum and Order (App. D-1) overruling the County Treasurer's motion for stay of judgment, motion for a new trial, and motion for the court to file findings of fact and conclusions of law, and holding that Harris County had no Eleventh Amendment rights that would prohibit satisfying this judgment from the County funds in the County Treasury.

On October 22, 1980, the Court of Appeals filed an opinion (App. E-1) reported at 628 F.2d 488 (C.A., 5th, 1980). The Court of Appeals affirmed the District Court, holding that Harris County was bound to satisfy the judgment against the County Treasurer, even though the County had not been a party to the suit, and holding also that Van Ooteghem's insistence on addressing Commissioners Court during working hours was a substantial factor in his dismissal, that the address was constitutionally protected, and that it would not significantly interfere with the operation of the Treasury nor impede the performance of Van Ooteghem's daily duties.

JURISDICTION

(i) On September 29, 1978, the District Court filed and entered its judgment reinstating Van Ooteghem as Assistant Treasurer, with back pay and attorney's fees to be paid from the funds of Harris County in the Treasury Department budget. (App. C-1)

(ii) On October 22, 1980, the Court of Appeals affirmed the judgment of the District Court. (App. E-1) No rehearing was sought.

(iii) This Court has jurisdiction under the statutory provision of 28 U.S.C. § 1254(1) to review this case from the Court of Appeals by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1) DOES AN EMPLOYEE HAVE A CONSTITUTIONAL RIGHT TO MAKE A SPEAKING APPEARANCE BEFORE A GOVERNMENTAL BODY FOR HIS OWN PERSONAL PURPOSES, AT THE EMPLOYER'S EXPENSE?

2) CAN HARRIS COUNTY BE BOUND TO SATISFY THE JUDGMENT AGAINST ITS COUNTY TREASURY, EVEN THOUGH HARRIS COUNTY WAS NOT A PARTY TO THE SUIT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Plaintiff Van Ooteghem claimed that his First Amendment Rights had been violated in his firing. Article I amending the Constitution reads:

> Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

By the Pretrial Order (R. 093) the parties stipulated that this case is controlled by 42 U.S.C. § 1983, and its jurisdictional statute 28 U.S.C. § 1343. (R. 097).

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.
>
> (b) For purposes of this section—
>
> (1) the District of Columbia shall be considered a State, and
>
> (2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Petitioner County Treasurer defends the non-payment of the judgment to respondent Van Ooteghem with Harris County funds in his custody, because Harris County was not a party to this suit. Vernon's Texas Rules of Civil Procedure, Rule 33, provides:

> Suits by or against a county or incorporated city, town or village shall be in its corporate name.

STATEMENT OF THE CASE

Petitioner Hartsell Gray was County Treasurer of Harris County, Texas, by election of the citizens county-wide, from January 1, 1975, until December 31, 1978. In mid-January, 1975, he employed an Assistant, respondent Gary John Van Ootegham, who was a Certified Public Accountant. The Treasury had much work for Van Ooteghem to do, and he was allowed to work at will so long as he timely performed his assigned duties. In July, 1975, Van Ooteghem requested and was given a week of accrued vacation time. At the end of the week he requested and received an additional week of vacation. Within a day or so after returning to work he told the County Treasurer that he had been participating in a rally

of homosexuals in Washington, D.C., in support of a homosexual discharged from the Armed Forces, that he himself was homosexual, and that he was interviewed by a national publication and might soon be in print in the publication. A day or so later he told the County Treasurer that he intended to go before Commissioners Court, the governing body of the Harris County corporate entity, to ask that body to take affirmative action for homosexuals in County government. The County Treasurer attempted to dissuade him, unsuccessfully. The next day the County Treasurer demanded that his Assistant sign a letter of acknowledgement that his working hours were from 8 til 5 Monday through Friday, with the noon hour for lunch, and that no political activities would be tolerated during working hours. (R. 040). Van Ooteghem refused to sign the letter of acknowledgement. The letter stated that a refusal to sign would be considered a negative reply, and that a breach of the provisions of the letter would be met with disciplinary action or dismissal. The letter is also in the Record as Plaintiff's Exhibit 1 appended to the deposition of Hartsell Gray. Later that same day, the County Treasurer discharged his Assistant (Record—Plaintiff's Exhibit 2 appended to the deposition of Hartsell Gray). The letter of discharge reads:

July 31, 1975

Mr. Gary J. Van Ooteghem

Your refusal to comply with the instructions set out in my letter of this date, a copy of which is attached hereto and incorporated herein by reference for all purposes, has resulted in the following action by me:

1) You are hereby fully and finally discharged from employment in the office of the County Treasury of Harris County, Texas, effective immediately.

2) You will forthwith remove all your personal belongings, and no others, from your office and vacate the premises.

Regretfully,

/s/ HARTSELL GRAY
Harris County Treasurer

The day following his discharge as Assistant Treasurer, Van Ooteghem did appear before and address Commissioners Court. His presentation is summarized in plaintiff's Post Submission Memorandum of Law (R. 078). He concluded his remarks by saying that his time had come to stand up and defend the rights of homosexuals. Later in the month he instituted this suit.

BASIS FOR FEDERAL JURISDICTION IN TRIAL COURT

By the Pretrial Order (R. 093) the parties stipulated to the District Court that this case is controlled by 42 U.S.C. § 1983, and its jurisdictional statute 28 U.S.C. § 1343 (R. 097).

ARGUMENT

1) DOES AN EMPLOYEE HAVE A CONSTITUTIONAL RIGHT TO MAKE A SPEAKING APPEARANCE BEFORE A GOVERNMENTAL BODY FOR HIS OWN PERSONAL PURPOSES, AT THE EMPLOYER'S EXPENSE?

This case does not present a situation of censorship on speech. The only element involved is that of the employer to fix the hours and place of work for the

employee, and to discharge an employee who will not comply with such hours and place of work. At Page 49, line 13 of his deposition Hartsell Gray testified:

> His policy was that he was going to go to Commissioner's Court and make a political statement on County time, as the comptroller of the Treasury. And, you know, this just wasn't going to happen.

At Page 51, line 6 of his deposition Hartsell Gray testified:

> . . . The point that I think was well taken was that he had a right to petition the legislature, and that he had a right to expect that I would stand by his right to petition the Legislature. He took his own time to do it. His own vacation time that I had agreed to. . . .

Then, at Page 72, line 11 of the deposition, Van Ooteghem's counsel asked:

> Q. Would you have terminated Mr. Van Ooteghem if he had been on vacation when he made that address?
> A. I wouldn't have had any grounds to, if he had simply followed the letter that I handed him, you know.

At Page 7 of the District Court's Memorandum and Order of March 20, 1978, (R. 121) the Court noted that:

> . . . Had the Plaintiff requested time off from such hours to tend to personal affairs, it is doubtless that he would have obtained it. . . .

The District Court prefaced that statement by saying:

> To contend that the Plaintiff was fired solely for his refusal to comply with such hours is unrealistic.

What is unrealistic about an employer demanding that an employee do his work during the period for which he is being paid? Even a public employee being paid with public funds. If the County Treasurer doesn't demand that one Assistant Treasurer take vacation time to work on his own personal affairs, but pays him public money while he pursues his individual interests, then he will be discriminating against all his other Assistants who have their own individual axes to whet—preferably at public expense. That, of course, is the preference of the employee, not the employer. If the employer gives up his prerogative of requiring his employees to work while they are being paid to work, then he will be faced with the prospect of paying other employees to work while they are actually devoting their paid work time to speaking out in Commissioners Court in opposition to homosexual rights. That tag is most unfortunate to intrude into this fact situation, as the County Treasurer would be just as demanding that his employees use their own time to speak out before any forum on any non-Treasury business matter—such as Save-The-Whales issue, or Free-The-Hostages issue, or any other issue that may from time to time be of importance to an individual employee but would be totally alien to conducting the Treasury operation.

This case was tried on the record by the District Court. No witness took the stand and there was no oral argument to the Court. The written record on which the District Court and the Court of Appeals reached their decisions is before the Supreme Court in the same form it was before the lower Courts. At Paragraph IV, subparagraph 13 of his Complaint Van Ooteghem pleads that he declined to sign an acknowledgement of the letter

from the Treasurer fixing his work hours to prevent him from carrying on political activities during said hours, and was then terminated at the end of the same business day. That is the only fact pleaded as to the reason for the discharge. (R. 004). The deposition of the County Treasurer was before the District Court, and the undisputed testimony therein (and quoted above) discloses that Van Ooteghem did not make a request for vacation leave, or time off without pay, to go on his speech-making crusade to Commissioners Court, because such request would have been honored and would not have resulted in the discharge. Also before the Court is the Pretrial Order (R. 093) with certain Admissions of Fact by both parties. Admission 6 (R. 096) stipulates that there were no other statements or actions than Van Ooteghem's intent to speak before the County Commissioner's Court on civil rights of homosexuals that were a causal factor in the County Treasurer's decision to terminate Van Ooteghem. This is not a stipulation that he was fired because of his intent to speak out. The stipulation must be considered in the light of Admission 8 (R. 096) that Van Ooteghem refused to sign the letter acknowledging his assigned working hours and place of work and was then terminated by the County Treasurer that same date.

The only evidence before the Court discloses that the County Treasurer fired the Assistant Treasurer because of his refusal to work the assigned hours of 8 til 5 at his assigned work area. No evidence exists that there was any other motive for the discharge. Van Ooteghem has not met his burden of coming forward with proof or even any evidence that he was fired on the mere pretext of refusing to acknowledge working hours and place. There is no evidence that Van Ooteghem requested vaca-

tion time to go speak to Commissioners Court. If the Court disbelieved all the testimony of the County Treasurer to the effect that he fired his Assistant Treasurer because he would not permit an employee to engage in his own individual political activities while being paid to work at his assigned area, and the Assistant insisted on using his employer's time—with pay—to go about his own personal business affairs, then the Court is left with no evidence as to the reasons for the discharge. With no evidence before it, judgment should be for the employer County Treasurer, as the employee Assistant has the burden to prove his firing was unlawful and has not met that burden.

2) CAN HARRIS COUNTY BE BOUND TO SATISFY THE JUDGMENT AGAINST ITS COUNTY TREASURY, EVEN THOUGH HARRIS COUNTY WAS NOT A PARTY TO THE SUIT?

The District Court handed down its original Memorandum and Order in this cause on March 20, 1978. With all the dignity of the Supreme Court behind the cases of *Monroe v. Pape,* 365 U.S. 167 (1961); *Moor v. County of Alameda,* 411 U.S. 693 (1973); *Kenosha v. Bruno,* 412 U.S. 507 (1973); and *Aldinger v. Howard,* 427 U.S. 1 (1976), plaintiff Van Ooteghem well knew the law that he could not sue Harris County under the Civil Rights Act—and he didn't sue Harris County. Some six weeks after the Memorandum and Order on March 20, 1978, this Supreme Court wiped out the long standing body of law protecting local governmental bodies when it decided *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, decided June 6, 1978.

In *Monell,* the City of New York was named as one of the defendants. 436 U.S. at 661. This Court said that "Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690. "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." 436 U.S. at 691. ". . . (L)ocal governments, like every other § 1983 'person', by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." 436 U.S. at 690-691.

Harris County cannot quarrel with the fact that it is a "person" under the Civil Rights Act and subject to suit—since *Monell.* However, under the law AS IT EXISTED when this case was filed, when both sides stipulated the facts, and when the District Court decided the case on March 20, 1978, Harris County was immune to the suit and was not sued by the plaintiff Assistant Treasurer, nor was judgment rendered against Harris County by the District Court when it first decided the case on March 20, 1978. Relying on *Moor v. Alameda County,* then flying as the law of the land, Harris County did not intervene in trial to defend its immunity. It is a foolish person who flees when no one pursues. Had Harris County been a party to the suit, or had *Monell* been decided prior to the submission on stipulations of this case, this case assuredly would have been tried differ-

ently in the District Court. Under its cloak of immunity to Civil Rights Act suits, Harris County was under no duty to intervene and defend itself in the suit brought by the fired Assistant Treasurer against his Treasurer employer. Harris County still enjoyed that immunity when the case was submitted on stipulations, and when it was tried and decided on March 20, 1978. The "deep pocket" of Harris County did not become an issue in this case until after the decision of *Monell* on June 6, 1978. By its Memorandum and Order of September 29, 1978, and November 20, 1978, the District Court made an ex post facto application of *Monell* to Harris County to bear the brunt of the penalty for the Treasurer terminating his Assistant, an act for which the County was immune under the *Moor* decision at the time of the firing, at the time this suit was instituted, at the time it was tried, and at the time it was decided on March 20, 1978. This ex post facto application, without also giving Harris County an opportunity to defend itself, is a denial of due process. If Harris County is a "person" subject to the payment of thousands of dollars under the Civil Rights Act, how can any one doubt that it is also a "person" entitled to due process of law under the Fifth and Fourteenth Amendments? The County Treasurer is ordered by the judgment to turn over to the discharged employee thousands of dollars of money he holds as the "cash register" of Harris County. It differs no iota from the cashier of First National Bank being ordered to pay a judgment against him from the funds of his depositors.

In *Monell,* the City of New York was actually sued as a defendant and was before the Supreme Court when the case was tried. Also, at issue therein was the official policies of the City being executed by the employees of

the City. In *Hutto v. Finney*, 437 U.S. 678, decided a couple weeks after *Monell*, the named defendants were state officials carrying out state policies. Here, the County Treasurer is independently elected by the voters of the County. He runs his office according to state statutes, not to further any County policy. There is no evidence before the Court authorizing a judgment against the County money as a penalty against the taxpayers of the County for the bad faith of the County Treasurer in demanding that his Assistant work during his time he was being paid and leave personal politicking to his off-duty time.

WHEREFORE, petitioner County Treasurer Hartsell Gray prays the Court to reverse the Court of Appeals and District Court with directions to dismiss this suit for failure to state a cause of action on which relief can be granted.

Respectfully submitted,

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Attorneys for Petitioner
County Treasurer Hartsell Gray

CERTIFICATE OF SERVICE

This is to certify that on this 20 day of January, 1981, I placed in the United States Mail Service with proper postage prepaid ~~two~~ 3 copies of the Petition for Writ of Certiorari in the subject suit, addressed to counsel of record for respondent Gary John Van Ooteghem.

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Mr. Larry Sauer
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Billy E. Lee

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APPENDIX

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 75-H-1501

JOHN VAN OOTEGHEM

v.

HARTSELL GRAY, ET AL

Larry Sauer, Houston, Texas, attorney for Plaintiff.

Billy E. Lee, Assistant County Attorney, Houston, Texas, attorney tor Defendants.

March 20, 1978

MEMORANDUM AND ORDER

This case is before the court for decision upon stipulated facts. Plaintiff, John Van Ooteghem, was hired by Defendant, Hartsell Gray (Gray), the Treasurer of Harris County, Texas, as an accountant on January 13, 1975. Approximately six months later on July 28, 1975, Gray was informed by Plaintiff that he was a homosexual. The next day, July 29, 1975, Plaintiff told Gray that he intended to go before the Harris County Commissioners Court during their regular public grievance forum to

advocate the recognition of the civil rights of homosexuals. On July 31, 1975, the Plaintiff was asked to sign a letter which required him to be in the office from 8:00 to 12:00 A.M. and 1:00 to 5:00 P.M., and to restrict his political activities to his own time. Plaintiff refused to sign this letter. Later the same day the Plaintiff was given another letter stating that he was discharged for his refusal to acknowledge the first letter. The next day the Plaintiff went before the Commissioners Court and made a presentation advocating the civil rights of minorities and homosexuals.

The question before the court is whether the Plaintiff's discharge violated his constitutional rights, particularly his First Amendment right of free speech. The state has a legitimate interest in the activities of its employees and First Amendment rights of such employees may be curbed in the interest of the state as an employer. However, such rights may not be denied altogether. These conflicting interests have, not unsurprisingly, resulted in a balancing test, as stated in *Pickering v. Board of Education,* 391 U.S. 563 at 568, 88 S.Ct. 1731 at 1735 (1968):

> "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

The efficient running of a public office and maintaining public confidence in that office are concerns that may limit the exercise of First Amendment rights. In regard to the rights of homosexuals, it has been held that a state may discharge an employee for an immodest flaunting of his homosexuality. *McConnell v. Anderson,* 451 F.2d 198 (8th Cir. 1971), cert. den. 405 U.S. 1046 (1972); *Singer v. United States Civil Service Comm'n,* 530 F.2d 247 (9th Cir. 1976), vacated and remanded 429 U.S. 1034 (1977). However, where no improper conduct, such as applying for a marriage license with a person of the same sex, kissing a person of the same sex in public, or participating in homosexual demonstrations, has occurred and where the individual has not purposely sought out notoriety, a discharge for a person's advocacy of homosexual rights is unconstitutional. *Aumiller v. University of Delaware,* 434 F.Supp. 1273 (D.Del. 1977).

The Plaintiff in this case had no tenure, and by statute could be terminated at the pleasure of the County Treasurer. Tex. Rev. Civ. Stat. Ann. art. 2372(h)(1). However, such a statute cannot legitimize a discharge for the exercise of protected constitutional rights. *Perry v. Sinderman,* 408 U.S. 593, 92 S.Ct. 2513 (1972); *Garza v. Rodriguez,* 559 F.2d 259 (5th Cir. 1977). Once a plaintiff has shown that his conduct was constitutionally protected and was a motivating factor in the employer's decision to termniate him, it becomes the employer's burden to demonstrate by a preponderance of the evidence that he would have discharged the plaintiff even in the absence of the protected conduct. *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 97 S.Ct. 568 (1977). Therefore this court must determine what par-

ticular conduct prompted the Plaintiff's discharge, whether such conduct was constitutionally protected, and, if so, whether there was a collateral justification for the termination.

Prior to the critical three days in July, it is evident that the Plaintiff maintained his own working hours. (Gray Dep. 15). The Plaintiff was working well over 40 hours a week in a professional capacity (Gray Dep. 10). Although it appears that the Plaintiff was formally required to ask for leave off from work, such leave was freely given. (Gray Dep. 15, 72). The Plaintiff was doing an excellent job, and was termed by Gray, his direct employer, as a "brilliant accountant". (Gray Dep. 60, 64). Gray had personally interviewed the Plaintiff, and had at that point suspected his homosexuality. (Gray Dep. 7). However, it was the policy of the Treasury to hire minorities, and in fact there were other suspected homosexuals working in the office who had not incurred the open displeasure of other employees. (Gray Dep. 40-41). Gray himself has stated that it was the Plaintiff's intent to address the Commissioners Court that precipitated his discharge. (Gray Dep. 46).

This court finds that the Plaintiff's conduct in advising his employer that he intended to speak at the Commissioners Court was constitutionally protected. It is clear that the letter restricting the Plaintiff's working hours was the first time that strict hours had been imposed on the Plaintiff. (Gray Dep. 54, 56). Prior to that the Plaintiff had worked his own long hours, and had been given vacation time at will. His temporary absence to address the Commissioners Court could not have substantially impeded the functioning of the Treasury. The

Plaintiff had been performing his job well, the only disruption occurring during the three days of Plaintiff's disclosure and discharge. Such disruption was as much Gray's fault for imposing strict hours as the Plaintiff's. Although Gray contends that the Plaintiff was fired for his refusal to accept the strict working hours, it is obvious that the imposition of such working hours was aimed at preventing the Plaintiff from addressing the Commissioners Court. Such public advocacy of civil rights is constitutionally protected. Gray's argument that Plaintiff's presentation on homosexuality to the Commissioners Court during regular working hours would prejudice the public confidence in the State Treasury does not rise to a level that merits restricting First Amendment rights. Plaintiff addressed the court as a private individual. His employment and the timing of his speech cannot alone attribute his views to those of his public office. *See Aumiller v. University of Delaware, supra,* at 1295-96. Finally, the record is devoid of any collateral justification for the Plaintiff's discharge. The Plaintiff was performing well and there was no evidence to indicate that his job performance would have suffered in the future. Gray had testified that he suspected the Plaintiff's homosexuality when he hired him and that other possible homosexuals were working without incident in the office. Therefore the very fact of Plaintiff's homosexuality cannot justify a discharge on the basis of impeding office routine. It is the conclusion of this court that the Plaintiff was terminated because he planned to address the Commissioners Court on homosexual rights. Time restrictions were imposed on the Plaintiff for the first time when he informed Gray of his intentions. These time restrictions were obviously aimed at preventing the Plaintiff from making

his public speech. To contend that the Plaintiff was fired solely for his refusal to comply with such hours is unrealistic. Had the Plaintiff requested time off from such hours to tend to personal affairs, it is doubtless that he would have obtained it. The abrupt imposition of strict working hours on a professional cannot be used as a weapon to prevent him from exercising his First Amendment rights. Plaintiff shall be reinstated and granted back pay, however it does not appear to this court that compensatory and punitive damages are merited. Therefore it is

ORDERED that Plaintiff's motion for summary judgment is GRANTED, Plaintiff to be reinstated and granted back pay.

Counsel are directed to prepare a proper form of judgment. If agreement cannot be reached, a hearing will be set to settle the form of judgment and the amount of back pay which would be allowed.

DONE at Houston, Texas, this 20th day of March, 1978.

/s/ ROSS N. STERLING
United States District Judge

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 75-H-1501

GARY JOHN VAN OOTEGHEM

v.

HARTSELL GRAY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TREASURER OF HARRIS COUNTY, TEXAS

Pape & Mallett (J. Patrick Wiseman), Houston, Texas, and Larry Sauer, Houston, Texas, attorneys for Plaintiff.

Billy E. Lee, Assistant County Attorney, and Friloux, Smith & Abney (C. Anthony Friloux), Houston, Texas, attorneys for Defendant.

September 29, 1978

MEMORANDUM AND ORDER

Presently pending before the court is the Defendant Hartsell Gray's application for leave to file motion to set aside judgment and reopen evidence. This motion is an effort to set aside the order of this court entered on March

20, 1978, on the basis that Gray did not agree with nor authorize the stipulation entered into by his counsel upon which the order of the court was based. Counsel for both parties were before the court on November 18, 1977, on which date they submitted this case for decision on stipulations. The stipulated facts were put into written form in an agreed pretrial order filed on January 16, 1978. This court considered such stipulated facts and on March 20, 1978, entered an order finding that Plaintiff had been unconstitutionally discharged and that he was entitled to reinstatement and back pay. On July 25, 1978, in a hearing on a motion for entry of judgment based on the order entered by the court on March 20, 1978, the court noted a conflict of interest between the County Attorney's representation of Hartsell Gray as County Treasurer and Hartsell Gray as an individual. Since then, Hartsell Gray has obtained separate counsel to represent him as an individual, in the yet pending question as to Hartsell Gray's individual liability for the back pay.

Hartsell Gray contends that his counsel's conflict of interest prejudiced his case to the effect that the County Attorney did not probe evidentiary matters to Hartsell Gray's individual best interest. Moreover, Hartsell Gray contends that he never agreed to nor authorized the stipulations upon which the case was tried. The court is not persuaded by such contentions.

The facts which Hartsell Gray offers to introduce, if this court should reopen the evidence, do not amount to new evidence which Gray could have only recently discovered. These facts, which were not incorporated into the stipulations, involve the conduct of the Plaintiff in the Treasurer's office, and his relationships with other

Treasury employees. Such evidence was available to Gray's counsel prior to this time, and is not such latent evidence that has only now been discovered.

Addressing Gray's allegation that his attorney's conflict of interest prejudiced him in his selection of stipulations, the court notes that there arose no conflict of interest at the stage of his litigation when the constitutional question was determined. The conflict arose only after the court found a constitutional violation and a liability for back pay. Once a finding of liability for back pay had been made, a conflict arose as to Hartsell Gray's individual liability for such back pay as opposed to the liability of the office of the County Treasurer. Prior to the back pay determination, both Hartsell Gray individually and Hartsell Gray as County Treasurer maintained the same position asserting that Plaintiff was discharged for good cause.

This court will adhere to the stipulations voluntarily agreed to by counsel for both parties. It matters not that Hartsell Gray's new individual counsel disagrees with prior counsel's stipulations and tactics. As stated in *King v. Edward Hines Lumber Company,* 68 F.Supp. 1019 (D. Ore. 1946):

> "Counsel for plaintiff, who have been employed since the trial, and who know nothing except by hearsay as to what happened in the courtroom, outside of the written record, seek now to repudiate the admissions made in the pretrial conference, in the pretrial order and at the trial. . . .
>
> "An admission by counsel in open court made part of the judicial record and used as a foundation for a judgment is the most solemn and binding act.

> No matter what the circumstances were the fact admitted of record binds the parties and the privies. No matter what the legal rights of the client were, the attorney in a civil case can destroy them all by admissions made in the record. Otherwise, we turn our face against the whole course of history as to judicial proceedings exemplified by the common recoveries of the early common law which were founded upon the solemn admissions of facts which before their entry were fictitious. In modern times the consent decree of the court is given absolute effect." 68 F.Supp. 1019 at 1020, 1021 cited in 3 MOORE'S FEDERAL PRACTICE, ¶ 16.20, p. 1138.

It is the opinion of this court that the stipulations entered into by counsel for both parties are binding upon them. If this were not the case, a party could easily stipulate to facts, take his chances upon a finding by the court, and upon a disappointing judgment seek new counsel and a withdrawal of stipulations. Therefore it is

ORDERED that Hartsell's Gray's motion to set aside the order of March 20, 1978, and to allow a reopening of the evidence is hereby DENIED.

The court further finds that the judgment in this case must be against Gray in his official capacity only. A judgment to this effect is entered with this Memorandum and Order.

DONE at Houston, Texas, this 29th day of September, 1978.

/s/ ROSS N. STERLING
United States District Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 75-H-1501

GARY JOHN VAN OOTEGHEM

v.

HARTSELL GRAY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TREASURER OF HARRIS COUNTY, TEXAS

JUDGMENT

This action came on for trial before the Court sitting without a jury upon stipulated facts and upon consideration of the stipulations, the deposition and exhibits, and the entire record herein, the Court having concluded that Plaintiff is entitled to judgment in this action, in accordance with the memorandum opinion filed herein on March 20, 1978, it is

ORDERED, ADJUDGED and DECREED:

1. That Defendant, his agents, successors and assigns, and all those having actual notice of this judgment be, and the same hereby are, enjoined from denying Plaintiff his lawful employment to prevent him from exercising his First Amendment rights and Plaintiff shall be, and

is hereby reinstated to his position as Assistant County Treasurer.

2. That the Defendant, his agents, successors and assigns, and all those having actual notice of this judgment be and the same hereby are, enjoined from withholding Plaintiff's back pay in the amount of $56,046.92, calculated in the following manner, $70,954.55 total back pay, offset by Plaintiff's personal earnings during said period in the amount of $14,907.63. Interest is to run upon the aggregate at the legal rate from March 20, 1978 until satisfied. Said sum is to be paid by the Defendant in his official capacity from the Departmental Budget of the County Treasurer's Office.

3. That the judgment herein be, and the same hereby is, entered for Plaintiff in accordance with the preceding paragraphs; and

4. That Plaintiff recover of the Defendant in his official capacity, to be paid from the Departmental Budget of the County Treasurer's Office, his taxable costs including reasonable attorney's fees which the court finds to be $7,500.00.

DONE at Houston, Texas, this 29th day of September, 1978.

/s/ ROSS N. STERLING
United States District Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 75-H-1501

GARY JOHN VAN OOTEGHEM

v.

HARTSELL GRAY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TREASURER OF HARRIS COUNTY, TEXAS

Larry Sauer, Houston, Texas, and Pape & Mallett (J. Patrick Wiseman), Houston, Texas, attorneys for Plaintiff.

Billy E. Lee, Assistant County Attorney, and C. Anthony Friloux, Houston, Texas, attorneys for Defendant.

November 20, 1978

MEMORANDUM AND ORDER

Plaintiff brought this suit pursuant to 42 U.S.C. § 1983 against Hartsell Gray, individually and in his official capacity as treasurer of Harris County, Texas, to redress the deprivation of his First Amendment rights. This court

found that Plaintiff was wrongfully discharged for conduct which was protected by the First Amendment of the Constitution, and ordered that Plaintiff be reinstated and granted back pay. (Memorandum and Order March 20, 1978.) Judgment was entered granting Plaintiff back pay in the amount of $56,046.92 and attorney's fees in the amount of $7,500.00 to be paid by Hartsell Gray in his official capacity from the Departmental Budget of the County Treasurer's Office. Hartsell Gray in his official capacity as County Treasurer (hereinafter referred to as Defendant) has now filed the following post-judgment motions: motion for the court to file findings of fact and conclusions of law, motion for stay of judgment, and motion for a new trial.

Defendant's motion for this court to file findings of fact and conclusions of law is denied. The 1946 amendment to Fed. R. Civ. P. 52(a) clearly indicates that an opinion or memorandum of decision by the court will suffice as findings of fact and conclusions of law. *Wynn Oil Co. v. Purolator Chemical Corp.*, 536 F.2d 84 (5th Cir. 1976); *McRea v. Harris County Houston Ship Channel Nav. Dist.*, 423 F.2d 605 (5th Cir. 1970). This court entered thorough memorandum opinions on March 20, 1978, and on August 9, 1978. Such opinions sufficiently meet the requirements of Fed. R. Civ. P. 52(a).

Defendant's motion for stay of judgment is denied. Defendant asserts that he lacks legal authority or capacity to pay the judgment from the County Treasury, and that it would be wrongful to reinstate the Plaintiff because a qualified successor has already been placed in his position. The court believes there is little likelihood of success on Defendant's attacks against either the money judgment

or the reinstatement order. Therefore the motion for stay is denied. *Pitcher v. Laird,* 415 F.2d 743, 744 (5th Cir. 1969).

Defendant in his motion for new trial alleges four points of error, as follows:

> "(1) There is no evidence in the record that plaintiff was terminated by defendant for any other reason than for his refusal to abide by the working hours and place prescribed by defendant employer;
>
> "(2) There is no evidence in the record that defendant is legally able to pay to plaintiff any amount of money from the Departmental Budget of the County Treasurer's Office;
>
> "(3) There is no evidence in the record concerning plaintiff's attorney's fees;
>
> "(4) There is no evidence in the record to support *any* of the Court's salient findings issued on March 20, 1978, and September 29, 1978, said findings forming the basis of the Judgment herein."

The court dismisses the no evidence points summarily, based upon the record. There is sufficient evidence to support the reasonableness of a $7,500.00 attorney's fees award to the Plaintiff. The court, from its knowledge of the case and other pertinent factors for the determination of a reasonable attorney's fee finds that the previous award is reasonable and proper. Therefore the court will sustain its prior award of $7,500.00 attorney's fees, granted pursuant to 42 U.S.C. § 1988. It is clear that there is no Eleventh Amendment bar to such an award of attorney's fees in civil rights cases. *Bond v. Stanton,* 555 F.2d 172 (7th Cir. 1977).

Defendant's most substantial contention looks to the Defendant's capacity as a County Treasurer to pay a money judgment from the Departmental Budget of the County Treasurer's Office. Although not couched in such terms, the court finds this to be an Eleventh Amendment issue questioning the enforceability of a money judgment against the county.

The United States Supreme Court in *Monell v. Dept. of Soc. Serv. of City of N.Y.*, ____U.S.____, 98 S.Ct. 2018 (1978), recently reversed *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and held that municipalities and other local government units could be sued as "persons" under 42 U.S.C. § 1983. The court stated:

> "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."

There can be no doubt that Defendant Hartsell Gray was acting in an official capacity when he discharged the Plaintiff. Hartsell Gray was acting as the County Treasurer when he discharged the Plaintiff, such decision needing no further approval to become effective. Therefore an official act of a governing body which deprived Plaintiff of his constitutional rights is quite evident in this case. The focus must then turn to the nature of the

governing body. *Monell* pried the protection against § 1983 suits away from "municipalities and other local government units." In footnote 54, p. 2035-2036, the court stated:

> "Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes."

Moreover in footnote 55, p. 2036, the court further excluded Eleventh Amendment considerations from its holding of liability:

> "Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent—at least where Eleventh Amendment considerations do not control analysis—our holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are 'persons' under § 1983 in those cases in which, as here, a local government would be suable in its own name."

Hartsell Gray was sued in his official capacity as County Treasurer of Harris County, Texas, *Monell, supra,* approves of such a suit against an official representative as a proper § 1983 action where the Eleventh Amendment would not preclude a suit against the governmental unit itself. The issue thus becomes whether a suit for money damages, in this case back pay, against the County Treasurer's Office or the County itself, is barred by the Eleventh Amendment. The key case defining the ambits of the Eleventh Amendment is *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347 (1974), where the general rule of immunity was stated:

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." 415 U.S. at 663, 94 S.Ct. at 1356.

In footnote 12 of *Edelman,* the Supreme Court dichotomized a county defendant's Eleventh Amendment and Fourteenth Amendment vulnerabilities:

> "The Court of Appeals considered the Court's decision in Griffin v. School Board, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964), to be of like import. But as may be seen from *Griffin's* citation of Lincoln County v. Luning, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890), a county does not occupy the same position as a State for purposes of the Eleventh Amendment. See also Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). The fact that the county policies executed by the county officials in *Griffin* were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment is no more than a recognition of the long-established rule that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment."

It, therefore, appears that a suit against a county does not raise Eleventh Amendment considerations. A county is essentially a local governing unit with local rather than statewide constituents, local rather than state officials, local rather than state taxes, and local rather than state treasury funds. The judgment in this case would be satisfied from the county treasury which funds constitute a

totally separate entity from Texas state treasury monies. There is no connection between Harris County and the state of Texas which would make the state of Texas the real party in interest in this case.

Having hurdled the Eleventh Amendment obstacle, Plaintiff must next show that the county is a "person" amenable to suit under the civil rights statute, 42 U.S.C. § 1983. The Supreme Court in *Moor v. County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785 (1973), had before it a suit similar to the case at bar in that the Plaintiff had sued a county among other defendants for money damages. The Court, relying solely on the legislative history of 42 U.S.C. § 1983 and its decision in *Monroe v. Pape, supra,* held that since municipalities were not persons for § 1983 purposes, a § 1983 suit for money damages was not available to the Plaintiffs against the county. However, the Court in *Monell,* after reconsidering the legislative history of 42 U.S.C. § 1983, has reversed *Monroe.* There is therefore no reason for the *Moor* decision, denying the right to sue a county under § 1983 for money damages, stand as precedent.

The court in *Monell* would not speculate as to what the proper result should have been on the facts in *Moor.* However, the court recognized that *Moor* had incorrectly construed § 1983 by relying on *Monroe* and barring suit against the county. The court stated in footnote 66, p. 2041:

> "No useful purpose would be served by an attempt at this late date to determine whether *Monroe* was correct on its facts. Similarly, since this case clearly involves official policy and does not involve *respondeat superior,* we do not assay a view on how our

> cases which have relied on that aspect of *Monroe* that is overruled today—*Moor v. Alameda, supra,* n.9, *City of Kenosha v. Bruno, supra,* n.9, and *Aldinger v. Howard, supra,* n.63—should have been decided on a correct view of § 1983."

It is clear then that *Monell* repudiates *Moor's* reliance on *Monroe* and its bar against suits aimed at local governments. *Monell* seeks to correct *Monroe's* restrictive construction of § 1983, and thus the ruling in *Moor* that a § 1983 suit against a county is barred, cannot stand. This court concludes that Plaintiff's suit against the Defendant in his official capacity as County Treasurer states a proper claim against a "person" pursuant to 42 U.S.C. § 1983, and that such claims for back pay are not barred by the Eleventh Amendment. It is

ORDERED that Defendant's motion for stay of judgment, motion for a new trial, and motion for the court to file findings of fact and conclusions of law are denied.

DONE at Houston, Texas, this 20th day of November, 1978.

/s/ ROSS N. STERLING
United States District Judge

APPENDIX E

Gary John VAN OOTEGHEM, Plaintiff-Appellee Cross-Appellant,

v.

Hartsell GRAY, Individually and in his cacacity as Treasurer of Harris County, Texas, (Henry E. Kriegel, successor in office), Defendant-Appellant Cross-Appellee.

No. 78-3711

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT,

Oct. 22, 1980.

Plaintiff, a former assistant county treasurer, brought action under Civil Rights Act of 1871 seeking reinstatement and back pay. The United States District Court for the Southern District of Texas, Ross N. Sterling, J., rendered judgment in favor of plaintiff, and appeal was taken. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) while plaintiff could have been fired for no reason whatsoever, it was a violation of his First Amendment right to free speech to fire him for addressing public body on subject of civil rights for homosexuals; (2) county treasurer's dismissal of his assistant for exercising his right to free speech represented "official policy" for which county could be held liable; (3) failure of former county assistant treasurer to name county expressly as a defendant did not constitute a violation of due process where county had both notice and opportunity to be heard; and

(4) trial court failed to make adequate findings in awarding attorney fees.

Affirmed in part and vacated and remanded in part.

Reavley, Circuit Judge, filed specially concurring opinion.

Appeals from the United States District Court for the Southern District of Texas.

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

GOLDBERG, Circuit Judge:

We are asked today to review the last scene of a real-life drama in which the lead actor, defendant Hartsell Gray, was featured in several roles. The district court concluded the performance by determining that Gray, while acting in his official role as Treasurer of Harris County, Texas, had discharged his co-star, plaintiff John Van Ooteghem, in contravention of the latter's First Amendment right to free speech. As the final curtain fell, the district court ordered the defendant to reinstate Van Ooteghem to his role as Assistant County Treasurer and awarded back pay which, in light of Gray's having acted in his official capacity in wrongfully dismissing Van Ooteghem, was to be paid from the Departmental Budget of the County Treasurer's Office. Appellant now challenges the finding of liability and the determination that the back pay award should be satisfied by Harris County. Finding that the district court was correct on both points, we perform the encore by affirming its decision. We do, however, remand the case on the issue of attorney's fees.

I. *The Factual Background*[1]

In January 1975, plaintiff John Van Ooteghem was hired by defendant Hartsell Gray, the Treasurer of Harris County, Texas, to serve first as Cashier Assistant County Treasurer, and later as Assistant County Treasurer. Van Ooteghem performed his job in a professional manner: he was recognized to be both hard-working and quite brilliant. Accordingly, Treasurer Gray treated the plaintiff with the respect due to a professional: Van Ooteghem was allowed to set his own hours and to take time off as needed.

On July 28, 1975, Van Ooteghem informed Gray that he was a homosexual and, shortly thereafter, related his plans to address the Commissioners Court on the subject of the civil rights of homosexuals. On July 31, 1975, Gray forwarded a letter to Van Ooteghem which purported to restrict the latter to his office between the hours of eight a.m. and twelve noon and from one p.m. until five p.m., Monday through Friday. These hours corresponded to the times during which citizens were allowed to address the Commissioners Court. Van Ooteghem was instructed to acknowledge his agreement with the new schedule by signing the letter; upon his refusal to do so, Van Ooteghem was dismissed.

In response, Van Ooteghem filed suit, pursuant to 42 U.S.C. § 1983[2] alleging that he was dismissed as Assistant

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1. The district court decided the case on the basis of stipulated facts.

2. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

County Treasurer in violation of his constitutional right to free speech.

II. *The Constitutional Violation*

[1, 2] While it is true that Van Ooteghem, a nontenured employee, could have been fired for no reason whatsoever, it is also true that no public employee can be dismissed from his job for a constitutionally infirm reason. *See Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 283-4, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977); *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). No governmental benefit can be denied for a reason that infringes constitutionally protected interests, including freedom of speech. *See, e.g., Perry v. Sindermann, supra; Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed. 2d 811 (1968).

In assessing whether Van Ooteghem's dismissal constituted a violation of his First Amendment right to free speech, the district court was faced with a tripart inquiry:

> 1. Was Van Ooteghem's speech to the Commissioners Court a "substantial" or "motivating" factor in his being dismissed;
>
> 2. Was this speech constitutionally protected; and
>
> 3. Would Van Ooteghem have been fired, in the absence of his decision to address the Commissioners Court?

See Mt. Healthy City School District v. Doyle, supra, 429 U.S. at 287, 97 S.Ct. at 576; *Givhan v. Western Line*

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of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Consolidated School District, 439 U.S. 410, 99 S.Ct. 693, 697, 58 L.Ed.2d 619 (1979). The court below decided each of these three questions in favor of Van Ooteghem and we have been asked by appellant to review all three findings. But our review is no easy task as substantial confusion exists as to the proper scope of appellate review and the standards to be employed in addressing each of these three questions.

[3] Many appellate decisions—especially in Title VII discrimination suits—have characterized the issue of an employer's motivation in dismissing an employee as one of ultimate fact, subject to plenary review. *See, e.g., Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1031 n.5 (5th Cir. 1980); *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382-3 (5th Cir. 1978); *Causey v. Ford Motor Company*, 516 F.2d 416, 420-1 (5th Cir. 1975). On the other hand, recent Supreme Court cases in the area have treated the question of the employer's motivation as one of "subsidiary" fact, subject only to "clearly erroneous" review. *See, e.g., Branti v. Finkel*, ____U.S.____, 100 S.Ct. 1287, 1291 n.6, 63 L.Ed.2d 574 (1980); *Givhan v. Western Line Consolidated School District, supra*, 99 S.Ct. at 697. In the majority of cases, the appellate court never articulates the standard it is employing in reviewing this question. Predictably, in the case at bar, appellant urges that we independently review the district court's finding that Van Ooteghem was fired for exercising his right to free speech, while appellees maintain that this conclusion must stand as long as we cannot find it to be "clearly erroneous."

Both parties in this action admit that Van Ooteghem's insistence on addressing the Commissioners Court (which

could only occur during the normal working day) precipitated the dismissal. However, the two sides characterize this one issue quite differently. Appellant argues that the event represented clear insubordination by an employee in unilaterally choosing to violate assigned working hours. Appellee responds that the institution of assigned hours and the subsequent dismissal for their breach were aimed solely at stymieing Van Ooteghem's free speech. The district court agreed with Van Ooteghem, finding that his speech to the Commissioners Court was a substantial factor in the decision to dismiss.

In making this finding, the district court was faced with a clear factual choice: was Van Ooteghem fired for his mere absence from work regardless of the purpose of this absence, or, alternatively, was the establishment of set working hours and the dismissal for their violation an attempt to prevent and punish his decision to speak to a political body on a controversial, political issue? Pursuant to Federal Rule of Civil Procedure 52,[3] the district court's finding on this factual issue cannot be set aside absent clear error. It is improper for an appellate court to subvert the clear mandate of Rule 52 by applying the phrase "ultimate fact" to important factual questions or to the last factual determination in a given case, in order to justify "plenary review" of an issue. Rather, use of the phrase "ultimate fact" should be limited to those determinations which, although appearing at first glance to involve only issues of fact, actually require the application of a lurking legal standard to the

3. Federal Rule of Civil Procedure 52 provides in pertinent part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of a trial court to judge of the credibility of the witnesses."

pre-determined facts of a case. In such cases, the appellate court's expertise in interpreting and applying the law justifies reliance on the term "ultimate fact" to distinguish the question from those which cannot be reversed, pursuant to Rule 52, unless "clearly erroneous."

[4] We cannot say that the trial judge's finding that Van Ooteghem's speech to the Commissioners Court was a substantial or motivating factor in his dismissal was clearly erroneous. Immediately after Van Ooteghem's announcement of his plan to address the Commissioners Court, Gray imposed a time schedule restricting Van Ooteghem to his office between set hours. Although the time schedule did not appear to be overly burdensome on its face, the new regulation was completely inconsistent with the professionalism that had previously typified Van Ooteghem's relationship with Gray and the Treasurer's Office. Van Ooteghem's compliance with the schedule would have necessitated the abandonment of his plan to address the Commissioners Court. The stipulated facts provide no basis from which any justification for the new schedule can be reasonably inferred, other than the desire to thwart Van Ooteghem's lobbying on behalf of homosexuals.

Having concluded that Van Ooteghem's speech was a substantial factor in his dismissal, we turn to the second part of our inquiry—whether the speech was constitutionally protected. The applicable test originates from the Supreme Court's opinion in *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968):

> The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen,

> in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Employing this test, the district court concluded that, on balance, Van Ooteghem's address was constitutionally protected.

[5] We regard the ultimate determination of whether an individual's speech was "constitutionally protected" to be a question of law. However, in balancing the interests discussed in *Pickering* in order to assess the protected nature of a given speech, an appellate court is constrained, absent clear error, to follow the trial court's findings as to the amount of disruption in the workplace caused by the employee's speech. In the present case, the trial court found that Van Ooteghem's speech did not significantly interfere with the operation of the Treasury nor did it impede Van Ooteghem's performance of his daily duties. Based on the stipulated facts of this case, we cannot find these conclusions to be clearly erroneous.

[6] Having accepted the trial court's finding as to the insignificance of the disruption caused by Van Ooteghem's speech, we are clearly led to the conclusion that, as a matter of law, Van Ooteghem's speech was "constitutionally protected." The state cannot prevent the speech of its citizen absent a compelling state interest. *See Branti v. Frankel,* ____U.S.____, 100 S.Ct. 1287, 1293, 63 L.Ed.2d 574 (1980); *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976); *Buckley v. Valeo,* 424 U.S. 1, 64-5, 96 S.Ct. 612, 656, 46 L.Ed.2d 659 (1976). In the employment context, this compelling

state interest standard is satisfied only upon proof that the regulation of speech was necessary to prevent "a material and substantial interference" with the operation of the public department. *Hastings v. Bonner,* 578 F.2d 136 (5th Cir. 1978). Gray's imposition of a restricted schedule was not justified by the need to prevent a material and substantial interference with the Treasury. It may be true that some treasury workers, or Gray himself, found the prospect of an employee addressing the Commissioners Court on homosexual rights to be distressing. However, the ability of a member of a disfavored class to express his views on civil rights publicly and without hesitation—no matter how personally offensive to his employer or majority of his coemployees—lies at the core of the Free Speech Clause of the First Amendment.[4] Thus, the type of disturbance possibly present here, as a matter of law, cannot present a "substantial and material interference." *Id.*

Up to this point, we have concluded that Van Ooteghem's constitutionally protected speech was a substantial factor in his dismissal. While it is clear that a dismissal

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4. In affirming the district court's finding that Van Ooteghem's speech was constitutionally protected, we add a note of caution concerning the test, first announced in *Pickering,* as to whether speech is "constitutionally protected." Since the formulation of the *Pickering* test in 1968, the Supreme Court has refined the analysis employed to accommodate the interests of the State and those of its citizenry under the First Amendment. Although the court in *Pickering, supra,* pursued this inquiry in terms of whether the speech in question was, "on balance", "constitutionally protected", 391 U.S. at 568, 88 S.Ct. at 1734, subsequent cases have clearly established that the analysis is more properly phrased as to whether the government's regulation of constitutionally-protected speech is justified by a compelling state interest. *See, e. g.; Branti v. Finkel, supra,* 100 S.Ct. at 1293. *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 2864, 49 L.Ed.2d 547 (1976); *Buckley v. Valeo,* 424 U.S. 1, 64-65, 96 S.Ct. 612, 656, 46 L.Ed.2d 659 (1976).

of an employee, which is substantially based on protected speech, constitutes a violation of the Constitution, the Supreme Court has recently concluded that such a violation does not justify remedial action[5] absent proof that "but for" the protected speech the employee would not have been dismissed. *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 575, 50 L.Ed.2d 471 (1977). The Court considered the issue of causation to be one of fact, *id.* at 576, and remanded the *Mt. Healthy* case for a determination whether the employee in that case would have been dismissed absent the protected conduct.

[7] In the case at bar, the district court found that Van Ooteghem would not have been dismissed but for his speech to the Commissioners Court. We cannot say that such a finding was clearly erroneous. Van Ooteghem was shown to be brilliant and hard-working. The record is absolutely devoid of any collateral justification for his discharge.[6]

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5. It is likely that the Supreme Court would permit an award of nominal damages to rectify a constitutional violation that was not proven to be the cause of the dismissal. Cf. *Carey v. Piphus,* 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (nominal damages recoverable for violation of procedural due process in the absence of proof of actual damages).

6. Having affirmed the district court's finding that Van Ooteghem's speech was the cause of his dismissal, we find appellant's arguments that new evidence has been found indicating that Gray had independent justification for firing Van Ooteghem to be irrelevant. Gray had no knowledge of these other justifications at the time of the dismissal; therefore, they could not have served as the basis of the dismissal. As noted earlier, while Van Ooteghem could have been fired for no reason whatsoever, it was a violation of his First Amendment right to free speech to fire him for addressing the Commissioners Court.

III. *Assessing Damages: The Many Shades of Gray*

Although Gray's dismissal of Van Ooteghem constituted a violation of the latter's constitutional rights, there is some doubt against whom the back pay award should be assessed. This doubt arises as a result of the fact, noted earlier, that throughout the scenario leading to Van Ooteghem's dismissal, Hartsell Gray appeared in several different roles. The County would have liked at trial to point the accusatory finger at Gray-the-citizen, thus rendering him personally liable to the plaintiff. In return, Gray-the-citizen would have desired to lay blame on his alter ego, Gray-the-official-representative-of-Harris County, thereby saddling liability on the County.

Spurred by these multi-interests on appeal, appellant Hartsell Gray-in-his-official-capacity has attempted to escape all liability by rewriting the script and creating a new hybrid villain—Hartsell Gray-the-Treasurer. On the one hand, appellant argues, it was Gray-the-Treasurer and not Gray-the-citizen who fired Van Ooteghem, so no personal liability can be assessed. At the same time, appellant notes, it was Gray-the-Treasurer and not Gray-the official-representative-of-Harris-County, who appeared in court, so that to impose liability on Harris County would constitute a violation of due process. Despite these chameleonic antics, the district court determined that Hartsell Gray was acting in his official capacity when he dismissed Van Ooteghem and that the back pay award could be levied against Harris County. We agree.

A. *Gray-the-Citizen Versus Gray-the-Official-Representative-of-Harris-County*

[8] In contesting the assessment of damages against Harris County, appellant first argues that a county cannot

be held liable for the action of its official in dismissing a county employee.

The Supreme Court in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), clearly delineated the guidelines for determining the cases in which a county will be considered to have acted as a "person" subject to suit under 42 U.S.C. § 1983:

> We conclude, therefore, that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

98 S.Ct. at 2038.

As is true of almost every newly-evolved legal standard, the application of the *Monell* test is not as easy as its delineation. The Supreme Court in its justifiable authoritarian voice in *Monell* has spoken and we workers in the judicial vineyard must labor together to attain the result that their wisdom commands. The question whether Gray's dismissal of Van Ooteghem was an "injury inflicted solely by [the County's] employees or agents" or, alternatively, whether it represented "the execution of a government's policy . . . made by [one] whose . . . acts may fairly be said to represent official policy" would be difficult to address without guidance. Fortunately, the necessary assistance has been provided by the recent and insightful discussion of the *Monell* problem in *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980). In

considering a Texas county's liability for the actions of a county judge in a § 1983 action, Judge Reavley noted:

> Because of the unique structure of county government in Texas, the judge—*like other elected county officials, such as the sheriff and treasurer*—holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein. [S. MacCorkle, D. Smith & J. May, Texas Government 347 (7th ed. 1974)]; E. Jones, J. Ericson, L. Brown & R. Trotter, Practicing Politics in Texas 205 (3d ed. 1977). Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983. *Monell v. Department of Social Services,* 436 U.S. at 694, 98 S.Ct. at 2038. *See generally,* Schnapper, *Civil Rights Litigation After Monell,* 79 Colum. L. Rev. 213, 215-19 (1979).

Familias Unidas v. Briscoe, 619 F.2d 391 at 404 (5th Cir. 1980) (emphasis added).

There is little doubt as to the wisdom of holding a county liable for an official's acts undertaken in those areas in which the official is the "final authority" or "ultimate repository of county power." The only way a county treasurer, or any local government entity, can establish "official policy" is through the actions of the individual, or group of individuals, who possess final authority within that body. Moreover, in the inevitable bureaucracy of our complex society, the policy decisions need not always emanate from apoghean planes in the

hierarchy, but often may have their source in subordinate realms. A county must be held accountable for more than its officially-codified policies; in cases where the written law of a local government entity vests unbridled authority in certain areas in an individual, his decisions become the controlling law and official policy of the entity.

Hartsell Gray was an elected official equal in authority to the County Commissioners in his domain. Pursuant to Texas law, Gray had complete authority for the hiring and firing of personnel within the Treasury. Tex. Rev. Civ. Stat. Ann. art. 3912c (Vernon 1966). When he so acted, he acted for Harris County; when he so erred, he erred for the County. Pursuant to the test enunciated in *Familias*, Gray's dismissal of Van Ooteghem clearly represented "official policy" for which Harris County may be held liable.[7]

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7. No party to the appeal has raised the question of conflict of interest arising from the county attorney's representation of Hartsell Gray in all capacities. Moreover, no party could prevail on this issue, given our conclusion that, as a matter of law (under *Familias*), Harris County must be liable for the actions of its Treasurer in the area of employment. However, a serious problem of conflict of interest could exist in future § 1983 actions in which one attorney represents both a county and a county official individually.

The genesis of the problem is easily located. Prior to the Supreme Court's decision in *Monell*, local government entities were not considered "persons" within 42 U.S.C. § 1983 and were not subject to liability under that statute. *See Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The interests of the employee, both individually and in his official capacity, completely coincided. Therefore, both the employee and the county benefitted from being jointly represented. However, the Supreme Court's decision in *Monell* has caused these interests to be realigned into adversity. Adverse interests in litigation require adverse legal counsel.

While the cure is as easily identified as the genesis of the problem, its fate rests in the hands of the Texas Legislature. For example, the County Attorney in the present case was merely following the man-

B. *Gray-the-Official-County-Representative Versus Gray-the-Treasurer*

[9] Appellant also argues that even if, in some circumstances, it is proper to hold a county liable for the wrongful actions of its official under *Monell*, it is a violation of due process to do so when the county itself was not actually named as a defendant in the action. Appellant by no means disputes that Hartsell Gray was named as a defendant in his official capacity; rather, he seems to argue that the mere naming of the official treasurer of the county as a defendant does not serve to make the county itself a party to the action. As noted above, this argument attempts to distinguish between Gray as a Treasurer and Gray as an official representative of Harris County. Since the former Gray cannot satisfy the back pay award from the County Treasury without violating the due process rights of the latter Gray (the county), it is argued, the liability must disappear.

Plaintiffs failed to name Harris County as a defendant in its original complaint because, at the time that the complaint was filed, counties could not be held liable as "persons" under § 1983. *See, e. g., Monroe v. Pape, supra.* The script for this play had been written and was in dress rehearsal for decision when *Monell* caused the authors to reexamine the script before a complete rewriting. Although future plaintiffs can, and may be well-advised to, join the local government entity as a defend-

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date of Tex. Rev. Civ. Stat. Ann. art. 331h (Vernon 1973) in representing all of the defendants in the lawsuit. Those statutes which provide for the joint representation of a county and its officials should receive the attention of the Legislature in light of the realities presented by *Monell.*

ant in § 1983 actions, we cannot find that the failure to name Harris County expressly as a defendant in this action constituted a violation of due process.

Courts have long recognized that suits against members of government in their official capacity directly implicate the interests of the government itself. As early as 1828, the Supreme Court noted:

> The claim upon the Governor is as a governor, he is sued, not by his name, but his title. The demand made upon him is not made personally, but officially.
>
> The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant, as the appealed bond was executed by a different governor from him who filed the information. In such a case, *where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think that the State itself may be considered a party on the record.* If the State is not a party, there is no party against whom a decree can be made. . . . This not being a proceeding against the thing, but against the person, a person capable of appearing as a defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

Governor of Georgia v. Madrazo, 1 Pet. (26 U.S.) 110, 123-4, 7 L.Ed. 73 (1828) (emphasis added).

The widespread recognition that the government entity itself is the real party in interest in "official capacity" suits has, in the past, presented severe difficulty for courts faced with applying the "person" requirement in

§ 1983 suits. For example, the Second Circuit in its consideration of *Monell v. Department of Social Services*, 532 F.2d 259 (2nd Cir. 1976), *rev'd*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), held that since municipalities cannot be sued as persons under § 1983 and since suits against city officials in their official capacity were "mere subterfuge" for suits against the real party in interest, the city itself, then city officials could not be sued in their official capacity under § 1983. *Id.* at 266. On certiorari, the Supreme Court in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), specifically agreed with the Second Circuit's conclusion that suits against city officials in their official capacity were merely an alternative form of pleading a suit against the city; however, the Court concluded that both forms of suit were permissible under § 1983. In so doing, the Court expressly equated suits against officers in their official capacity with suits against the government:

> Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent . . . our holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which, as here, a local government would be suable in its own name.

Id. at 2036 n.55.

As a practical matter as well, Harris County has been fairly treated. Since the inception of this lawsuit, Harris County has been aware, at a minimum, that a former employee was seeking reinstatement—a remedy which

by its nature could have implications only for the County. Pursuant to statute, Tex. Rev. Civ. Stat. Ann. art. 332c (Vernon 1973), all defendants in this action were represented by a county attorney. The County had both notice and opportunity to be heard, sufficient to comport with due process. We find, therefore, that the district court's assessment of damages against the county treasurer—in light of Hartsell Gray having acted in his official capacity when he dismissed Van Ooteghem—did not constitute a violation of due process.

IV. *Attorney's Fees*

[10] In its judgment of September 29, 1978, the district court ordered defendant to pay plaintiff $7,500.00 to cover "taxable costs including reasonable attorney's fees." The court failed to explain how it arrived at this figure and made no reference to the guidelines for awarding attorney's fees set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). At the time this award was entered, plaintiff had not yet filed his application for attorney's fees, nor had any evidence been submitted to the Court on which such an award could have been based.[8]

Although its position is not entirely clear, appellant seems to be arguing that it was improper to award fees in the absence of any evidence on the matter, and that, in order for the district court to hear any further evidence, both sides must be allowed to present evidence on any issue. Appellant concludes that in order for attorney fees

8. Plaintiff did formally file his application for attorney's fees on October 18, 1978. The district court subsequently concluded that its original award had been reasonable, but it failed once again, to justify the award based on the consideration enumerated in *Johnson*.

to be awarded, defendant Gray must be afforded a new trial. He supports this position by citing to "common justice" and to

> the tale of a fellow in a tree that was being shaken by a bear trying to dislodge him. The fellow was calling on the Lord to help him, with no noticeable help forthcoming therefrom. At last he ceased his plea with a final word: "Oh, Lord, if you aren't going to help me, then please don't help that bear."

[11] Although we neither profess to be the Lord nor do we support man-eating grizzlies, we do find appellant's contention that a new trial must be granted in order for attorney's fees to be awarded to be totally without merit. Attorney's fees are recovered as part of costs in § 1983 actions; as such, they may be and, in order not to delay the trial on the merits, often should be proven after a decision in the principal case has been reached. *See Gore v. Turner,* 563 F.2d 159, 163 (5th Cir. 1977). A motion for fees is not a motion to alter or amend the judgment, *Knighton v. Watkins,* 616 F.2d 795 (5th Cir. 1980), and therefore, does not require a reconsideration of the judgment.

[12] The appellate court does, however, have the duty to review the reasonableness of an award of attorney's fees for an abuse of discretion. *See Johnson, supra,* 488 F.2d at 717. Absent specific findings by the district court following the criteria enunciated in *Johnson,* appellate review of the reasonableness of the fee award becomes a task of pure speculation. Since we ought not to speculate with defendant's money and since an evidentiary hearing—solely restricted to the issue of fees—may be warranted, we vacate the award of $7,500 and remand

the case for entry of an order fixing a reasonable[9] fee and reflecting the considerations which led to it. *See id.* Given our concern for speed in judicial productions, we note that the remand for the proper determination of attorney's fees will not require a five act drama but merely an epilogue of slight proportions.

V. *Conclusion*

Defendant Hartsell Gray, while acting in his official capacity, dismissed plaintiff John Van Ooteghem in violation of the latter's right to free speech. Damages were properly assessed against Harris County. Finding no error in the proceedings below on the issues of liability and damages, we affirm those sections of the lower court's opinion.

The district court failed to make adequate findings in awarding attorney's fees. We vacate the award of $7,500 in attorney's fees and remand the case for reconsideration of this one issue.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

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9. We do not, however, by virtue of this remand intimate any view as to the reasonableness of the original award. We note only that, on remand, plaintiff should present proof of reasonable fees associated with this appeal and the remand, in addition to the proof already submitted.

REAVLEY, Circuit Judge, specially concurring:

I concur with the result and the reasoning of the majority's opinion with one exception. I cannot agree with the majority's conclusion in part II of the opinion that the balancing test enunciated by the Supreme Court in *Pickering* has somehow been transformed or "refined" into a compelling state interest test by the Court's subsequent decisions in *Buckley v. Valeo,* 424 U.S. 1, 64-65, 96 S.Ct. 612, 656, 46 L.Ed.2d 659 (1976); *Elrod v. Burns,* 427 U.S. 347, 362-63, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976); and *Branti v. Finkel,* ____U.S.____, ____, 100 S.Ct. 1287, 1293, 63 L.Ed.2d 574 (1980). I find no justification for the conclusion that cases subsequent to *Pickering* have "clearly established that the analysis [for determining whether a governmental employer may inhibit its employees' right of free speech] is more properly phrased as to whether the government's regulation of constitutionally-protected speech is justified by a *compelling state interest*" (slip opinion p. 511, p.____, n.4, emphasis added).

Branti v. Finkel and *Elrod v. Burns* involved discharges of governmental employees for patronage reasons. In each case, the Court clearly indicated that when political patronage is practiced the First Amendment rights of *belief* and *association* are restricted. *Branti,* ____U.S. at ____, 100 S.Ct. at 1289 ("question presented is whether the First and Fourteenth Amendments . . . protect [a governmental employee] who is satisfactorily performing his job from discharge solely because of his political beliefs"); *Elrod,* 427 U.S. at 355, 96 S.Ct. at 2680-81 ("cost of the practice of patronage is the restraint it

places on freedoms of belief and association"). In these cases, the Court held that in order for government to impose a restriction on public employment based on party identification, the restriction must survive "exacting scrutiny," which is synonymous with the "compelling state interest" test, *Sherbert v. Verner,* 374 U.S. 398, 406-07, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963); *Bates v. City of Little Rock,* 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480 (1960); *NAACP v. Alabama,* 357 U.S. 449, 463, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488 (1958).

In this case, however, we deal not with a governmental employee's rights of belief and association, but with his right of free speech. The Supreme Court has chosen to employ different levels of judicial scrutiny with respect to a government's restrictions on its employees' First Amendment rights: the constitutionality of an impairment on a public employee's rights of belief and association is determined by applying the compelling state interest test. *Elrod v. Burns,* 427 U.S. at 362-63, 96 S.Ct. at 2684, while the constitutionality of an impairment on his right of speech is determined by application of a balancing test, *Givhan v. Western Line Consolidated School Dist.,* 439 U.S. 410, 414, 99 S.Ct. 693, 696, 58 L.Ed.2d 619 (1979); *Mt. Healthy City School Dist. v. Doyle,* 429 U.S. 274, 284, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977); *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). In *Givhan* and *Doyle,* which were both decided subsequent to *Elrod v. Burns,* I fail to find any mention, either express or implied, of a refinement or metamorphosis of the *Pickering* balancing test into a compelling state interest

analysis; instead, in both cases the Court restates the *Pickering* test without modification.[1]

I am further convinced that a compelling state interest standard applies to restraints on public employees' rights of belief and association, while a balancing test applies to restraints on their rights to free speech, by reading the cases cited in *Elrod v. Burns*. Specifically, as authority for the proposition that "[i]t is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny," the Court in *Elrod* cites *Buckley v. Valeo*, 427 U.S. at 362, 96 S.Ct. at 2684. The portion of *Buckley v. Valeo* referred to dealt with the compelled disclosure requirements of the Federal Election Campaign Act of 1971.[2] The Court in *Buckley* noted that

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1. It is significant to note the following language from *Givhan*, 439 U.S. at 415 n.4, 99 S.Ct. at 696 n.4:

> "Although the First Amendment's protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the *content* of his statements that must be assessed to determine whether they 'in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally.' *Pickering v. Board of Education, supra*, 391 U.S., at 572-73, 88 S.Ct., at 1737. Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message, but also by the manner, time, and place in which it is delivered."

2. The law requires all political committees to keep detailed records of contributions. These records must include the name and address of every person contributing in excess of $10 and also his or her occupation and principal place of business if the aggregate contribution exceeds $100. Quarterly reports containing the full name, mailing address, occupation and principal place of business of every person contributing over $100 a year must be filed with the Federal Election Commission.

it had "repeatedly found that compelled disclosure, in itself, can seriously infringe on *privacy of association and belief* guaranteed by the First Amendment." 424 U.S. at 64, 96 S.Ct. at 656 (emphasis added). The Court further recognized "that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes [encroachments on privacy of association and belief] cannot be justified by a mere showing of some legitimate governmental interest"; instead since *NAACP v. Alabama,* 357 U.S. 449, 463, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488 (1958), the Court has "required that the subordinating interests of the State must survive exacting scrutiny."[3] *Id.*

The Court, by employing different standards to test governmental action that interferes with public employees' First Amendment rights, apparently differentiates between the primacy of the values protected by the rights of belief and association on one hand and the right of speech on the other. Freedom of "political belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns,* 427 U.S. at 356, 96 S.Ct. at 2681. They are the keystone rights of the First Amendment—the most preferred of the preferred rights. A public employee's belief and association rights rarely would result in a material and substantial interference with the interest of government "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education,* 391

3. In *NAACP v. Alabama,* the Court held that a compelling state interest must be demonstrated before government could impair an individual's First Amendment *right of association* by requiring an organization of which he is a member to disclose its membership rolls. 357 U.S. at 463, 78 S.Ct. at 1172.

U.S. at 568, 88 S.Ct. at 1735. However, the possibility for such interference is greater when the public employee transmits his beliefs in the form of speech.[4] Therefore, it is appropriate that a more lenient—from the governmental employer's perspective—balancing test is applied to restraints on public employees' speech, while a more stringent compelling state interest test is applied to restraints on their rights of belief and association.

The imposition of the compelling state interest test to the area of public employee free speech would work too onerous a burden on the governmental employer. Under the compelling state interest test, the burden is on the government to show the existence of a paramount, vital or compelling interest in conditioning a public employee's continued employment on a restraint of his First Amendment rights, which will further "some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Elrod v. Burns,* 427 U.S. at 362-63, 96 S.Ct. at 2685. A compelling state interest is most often present when the regulated conduct, normally protected by the First Amendment, poses "some substantial threat to public safety, peace or order." *Sherbert v. Verner,* 374 U.S. at 403, 83 S.Ct. at 1793. Rarely does government meet this burden when the compelling state interest test is applied. I am aware of only two

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4. I recognize that association is to some extent the outward indicia of belief, as is speech. Association, however, involves subjective elements as well, unlike speech which is purely objective. I also recognize that the line between association and speech is fine and often difficult to discern. Nonetheless, the Supreme Court has decided to test restraints on these rights with different standards. It is not our prerogative to disregard the Court's decision.

instances in which the Supreme Court has upheld governmental action when strict scrutiny or the compelling state interest test has been applied. *See Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (holding that contribution and compelled disclosure provisions of the Federal Election Campaign Act do not violate the First Amendment); *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (holding that legal restrictions on persons of Japanese descent during World War II were not unconstitutional).

I conclude that Van Ooteghem's speech was constitutionally protected under the balancing test of *Pickering.* In balancing the interests of Van Ooteghem in commenting on matters of public concern against the interest of Harris County as an employer in promoting the efficiency of public services performed by the county treasurer's office, I look to the values of the First Amendment in "having free and unhindered debate on matters of public importance," *Pickering,* 391 U.S. at 573, 88 S.Ct. at 1737, and whether addressing the commissioners court would "substantially and materially interfere" with the discharge of the duties and responsibilities inherent in Van Ooteghem's employment, *Smith v. United States,* 502 F.2d 512, 517 (5th Cir. 1974). *See Porter v. Califano,* 592 F.2d 770, 773 (5th Cir. 1979). The district court found that Van Ooteghem's "temporary absence to address the Commissioners Court could not have substantially impeded the functioning of the Treasury." I agree with the majority that this finding is not "clearly erroneous." On this basis I concur in the judgment of the court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-1284

HARTSELL GRAY, County Treasurer of Harris County, Texas (HENRY E. KRIEGEL, Successor in Office),
Petitioner

v.

GARY JOHN VAN OOTEGHEM,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The Respondent, GARY JOHN VAN OOTEGHEM, respectfully requests that this Court deny the Petition for Writ of Certiorari invoked pursuant to 28 U.S.C. § 1254(1), seeking review of the Fifth Circuit's opinion in this case. That opinion, styled *Gary John Van Ooteghem v. Hartsell Gray,* Individually and in his official capacity as

Treasurer of Harris County, Texas, (Henry E. Kriegel, Successor in office), No. 78-3711 and decided on October 22, 1980, is reported at 628 F.2d 488.

REASONS WHY WRIT SHOULD BE DENIED

Petitioner advances two reasons why he believes the Writ of Certiorari should be granted in the cause *sub judice*. He does not, however, assert a conflict between the decision below and that rendered by this Court or any other federal or state tribunal. Rather, the first involves no more than a request that this Court review the findings of facts concurred in by both the District Court and the Circuit Court. The second raises no substantive issue which has not been precluded by the prior decisions of this Court.

I.

RELITIGATION OF FACT ISSUES

(A) Petitioner Seeks Review of "Concurrent Findings of Facts"

As long ago as 1923 this Court defined the factors which make up its discretionary assumption of jurisdiction as excluding review of errors in the findings of fact of the lower courts. *Magnum Comp. v. Coty*, 262 U.S. 159, 163 (1923). Thus, it has been said:

> The Supreme Court is not, and never has been, primarily concerned with the corrections of errors in lower courts decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case.

> The debates in the constitutional convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, "to secure the national rights & uniformity of judgmts." The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen amongst lower courts, to pass upon questions of wide import under the constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.

Address of Chief Justice Vinson before American Bar Association, September 7, 1949, 69 S.Ct. V.VI. as reprinted in R. Stern and E. Gressman, *Supreme Court Practice,* 5th Ed. 1978 (Bureau of National Affairs, Inc.) at pp. 258-259. It is clear then that, if Petitioner seeks only review of the factual findings below, his Writ should be denied absent an exceptional showing of error. *Fortner Enterprises, Inc. v. U.S. Steel Corp.,* 394 U.S. 495 (1969). Upon examination the Petitioner's first argument, though put forth as if on a legal issue, is beyond question that he seeks review of the lower court's findings of fact. That is, while the Petitioner's argument assumes (without support in the record) a finding that Respondent's exercise of his First Amendment rights was in derogation of a neutral public employment regulation; in fact, the findings of the District Court as affirmed on

appeal were that Petitioner intentionally sought to deprive Respondent of his right to free speech through the subterfuge of restricting him to his office.

> It is the conclusion of this Court that the Plaintiff was terminated because he planned to address the Commissioners' Court on homosexual rights. Time restrictions were imposed on the Plaintiff for the first time when he informed [Petitioner] of his intentions. These time restrictions were obviously aimed at preventing the Plaintiff from making his public speech. To contend that the Plaintiff was fired solely for his refusal to comply with such hours is unrealistic. Had the Plaintiff requested time off from such hours to tend to personal affairs, it is doubtless that he would have obtained it. The abrupt imposition of strict working hours on a professional cannot be used as a weapon from preventing him from exercising his First Amendment rights.

District Court's March 20, 1978 Memorandum and Order (unpublished) reproduced as Appendix A of the Petition for Writ of Certiorari at pp. A-5, A-6.

In the body of his argument Petitioner forthrightly acknowledges that his complaint is solely directed to the District Court's findings. In light of the subsequent affirmance by the Fifth Circuit (*Van Ooteghem*, 628 F.2d at 492), such an argument does not rise to the level appropriate for the exercise of this Court's certiorari jurisdiction. The question here is similar to the question in *Berenyi v. District Director, Imm. and Nat. Serv.*, 385 U.S. 630 (1967) where this Court held that:

> The Petitioner asks us to reject as "clearly erroneous" the factual conclusion . . . reached by the Dis-

> trict Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncements that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (citations omitted).

Berenyi, 385 U.S. at 635. No obvious or exceptional showing of error having been made, the Petitioner's application should be denied.

(B) Petitioner Seeks to Shift the Burden of Proof

The argument is advanced by the Petitioner that Respondent did not meet his burden of proof at the trial level in that he offered no proof to substantiate his claim that his constitutional rights were violated. Petitioner is attempting to shift the burden of proof as set out in *Mt. Healthy City School District v. Doyle,* 429 U.S. 374 (1977) by ignoring the findings of the lower courts.

Mt. Healthy requires that a proponent show his conduct was constitutionally protected and then further establish that this conduct was a "substantial" or "motivating" factor in his employer's decision to terminate him. Once satisfied, it becomes the employer's burden to demonstrate by a preponderance of the evidence that he would have dismissed the proponent even in the absence of the protected conduct. *Mt. Healthy, supra* at 287. Petitioner had the benefit of the guidance of the *Mt Healthy* decision at trial, but wholly failed to go forward with his burden of proof.

Both the District Court and the Circuit Court analyzed the evidence in light of *Mt. Healthy,* and found without

question that Respondent did present sufficient evidence to substantiate his claim that his action was constitutionally protected and that it was a substantial factor in his dismissal. Moreover, both courts found the record to be totally devoid of any collateral justification for Respondent's discharge. District Court's March 20, Memorandum and Order (unpublished) reproduced as Appendix A of the Petitioner's Writ of Certiorari at pp. A-4 and A-5; *Van Ooteghem v. Gray,* 628 F.2d, at 493.

Even in light of these rulings Petitioner seems to argue that Respondent should have gone further in his proof, anticipating defenses which were not raised at the trial level, or anticipating all possible defenses, requiring Respondent to bear a burden of proof—of beyond all doubt. Petitioner's desire to increase Respondent's burden has no merit in light of *Mt. Healthy* and *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979).

II.

THE COUNTY IS LIABLE FOR ACTIONS OF POLICY MAKING OFFICIAL

At first examination Petitioner's second argument appears more substantial than his first. However, upon reflection it quickly becomes obvious that his assertions are foreclosed by earlier holdings of this Court. In capsule the Petitioner asserts that the County may not be held to answer in money damages where the elected, chief executive officer of a county agency is found liable in his official capacity. This argument was presented and dismissed by both courts below and does not provide the basis for plenary review here.

(A) Official Capacity Allegation is Suit Against County

The Petitioner asserts that Harris County was denied due process because it was not "sued" (i.e., named as a formal party in the pleading). This issue is obviously without merit.

> Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent . . . our holding today that local governments can be sued under § 1983 necessarily decides that local government officials are "persons" under § 1983 in those cases in which, as here, a local government would be sueable in its own name.

Monell v. Dept. of Social Services of City of New York, 436 U.S. 658, 690 n.55 (1978); *see generally Martinez v. State of California,* ____U.S.____, 100 S.Ct. 553, 558-9 (1980). *Monell* affirms that a government agent, sued in his "official capacity", is but a nominal defendant for the real party at interest. That real party at interest is the governmental entity to which the agent is responsible. This fact is graphically demonstrated by the judicial history of *Muzquiz v. City of San Antonio,* 520 F.2d 993 (5th Cir. 1975); rev'd on rehearing *en banc* 528 F.2d 499 (5th Cir. 1976); vacated 438 U.S. 901 (1978); on remand 586 F.2d 529 (5th Cir. 1978). There, a panel of the Fifth Circuit initially held that the trustees of the policemen's and firemen's pension fund were "persons" within the meaning of 42 U.S.C. § 1983. On rehearing *en banc,* the full Court found that federal courts did not have jurisdiction over individual members of such a Board of Trustees. This Court subsequently vacated the

en banc judgment and remanded the cause to the Circuit for "further consideration in light of *Monell*". On remand the Circuit found the Board amenable to suit under § 1983 and, by necessary implication, that the real party at interest remained the governmental entity.

Likewise, in *Quern v. Jordan*, ____U.S.____, 99 S.Ct. 1139, 1147 n.17 (1979) the status of a suit brought in a state officer's official capacity was analyzed in relationship to Eleventh Amendment immunity. The *Quern* court held that such an official capacity suit was a suit against the entity itself.

Thus, it is clear that by instituting this action against the Treasurer in his official capacity the County was fully on notice of its potential liability herein.

(B) No Vestiges of Immunity Exist

Likewise, the Petitioner complains that the governmental entity should not be made to answer for the illegal termination of the Respondent because of the immunities previously supposed to be afforded under the now discredited "person" requirement of *Monroe v. Pape*, 365 U.S. 167 (1961).

In essence this is a retroactivity[1] argument addressed to the *Monell* holding. It must fail.

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1. The term retroactivity may be misleading in this context. No new cause of action or legal right is created in *Monell*. Rather, *Monell* merely removes a supposed immunity to prosecution of a demonstrable wrong perpetrated by the governmental defendant. Thus, issues such as those raised in *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 n.15 (1974) are not implicated. The question is not whether the governmental entity has acted wrongly, the question is simply whether that entity should be allowed to continue asserting a defense from liability which has been found not to be authorized by statute or case law.

In *Monell* this Court left no doubt that the governmental entity's belief that it was shielded from liability by the *Monroe v. Pape* holding did not preclude liability.

> [M]unicipalities can assert no reliance claim which can support an absolute immunity. As Mr. Justice Frank Burger said in *Monroe*, "this is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decisions." 365 U.S. at 221-222, 81 S.Ct., at 503 (dissenting in part). Indeed, municipalities simply cannot "arrange their affairs" on the assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials under § 1983 would prohibit any such arrangement. And it scarcely need be mentioned that nothing in *Monroe* encourages municipalities to violate constitutional rights or ever suggests that such violations are anything other than completely wrong.

Monell, 436 U.S., at 699-700.

Even if the Petitioner could rely on the *Monroe* immunity prior to the rendering of the *Monell* decision it would give him no comfort here. At least since *Ex parte Young*, 209 U.S. 123 (1908) it has been understood that a suit against an official in his official capacity might render the institution liable for certain remedial sanctions. Only recently this Court has affirmed that a prevailing Plaintiff is entitled to relief as against the State when a state official is sued in his official capacity. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); and *Milliken v. Bradley*, 433 U.S. 267, 290 (1967). Likewise, the diverse reasoning of the various opinions handed down in *Muzquiz v. City of San Antonio, supra*, amply demonstrate that the governmental entity relied on its supposed immunity only at its own peril. The issue was obviously

open to debate and if the entity chose to neglect the defense of its treasurer in the District Court it should not now be heard to complain.[2]

Nor would such a complaint be fruitful. As established in *Owen v. City of Independence, Mo.*, ____U.S.____, 100 S.Ct. 1398 (1980) a governmental entity is entitled to no immunity distinct from its agents. In fact, such an entity has significantly broader liability than its officials.

> [T]here is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify [a] qualified immunity. . . . We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983. [footnote omitted.]

Owen, 100 S.Ct., at 1409.

The County, having suffered nothing by the prosecution of this action against the Treasurer in his official capacity, is justly responsible for the remedial undertakings required by the District Court.

(C) Dual Representation Precludes Individual Liability

Harris County, from the very inception of this matter, has responded as though this suit was brought against the County itself. The Treasurer, in both his official and individual capacity, was represented by the County At-

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2. As is more fully developed *infra* the defense of the Treasurer was conducted completely by the County Attorney's Office through the time that the District Court held that Van Ooteghem had been wrongfully discharged. Thus, it cannot be said that the County was a stranger to this litigation or somehow was not on notice of its potential liability.

torney. Such representation is, in fact, required by statute[3] whenever "the suit involves any act of the official or [governmental] employee while in the performance of public duties." Vernon's Texas Civil Statutes, art. 332(c). Therefore, even if the County had been actually named, it could not have been more actively involved in this matter. The County, through its own counsel, directed every substantive and tactical decision made. The very same attorney who seeks to shift liability to the personal stake of the Treasurer represented the Treasurer in both his individual and official capacity at the trial level. As this Court said in *Hutto v. Finney*, 437 U.S. 678 (1978), a case involving the award of attorneys' fees:

> We do not understand the Attorney General [of Arkansas] to urge that the [liability] should have been awarded against the officers personally; that

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3. The statute in its entirety reads as follows:

Representation of County Officials and Employees by District, County or Private Attorneys

Section 1. In this Act, "nonpolitical entities" means any person, firm, corporation, association, or other private entity, and does not include the State, a political subdivision of the State, a city, a special district, or other public entity.

Section 2. In any suit instituted by a nonpolitical entity against an official or an employee of a county, the District Attorney of the District in which the County is situated or the County Attorney, or both, shall, subject to the provisions contained in Section 3, represent the official or employee of the County if the suit involves any act of the official or employee while in the performance of public duties.

Section 3. If additional counsel is necessary or proper for an official or an employee provided legal counsel by Section 2 of this Act, or if it reasonably appears that the act complained of may form the basis for the filing of a criminal charge against the official or employee, the County Commissioners' Court shall employ and pay private counsel.

Section 4. Nothing in this Act requires a County official or employee to accept the legal counsel provided for him in this Act.

> would be a remarkable way to treat individuals who have relied on the Attorney General to represent their interest throughout this litigation.

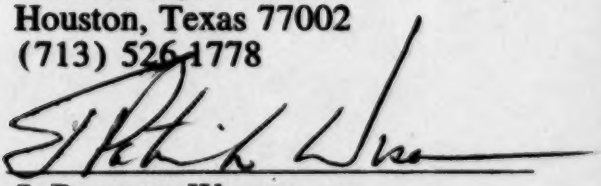
Hutto, 437 U.S., at 692 n.19. Paraphrasing *Hutto* the County Attorney is hardly in a position to argue that the award should be borne not by the County, but by the Treasurer individually after the Treasurer has relied on the County Attorney's Office to protect his interest throughout the District Court's resolution of this matter. *See Hutto*, 437 U.S., at 699 n.32.

CONCLUSION

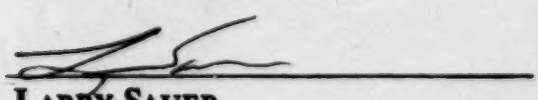
For each of these reasons Respondent suggests that the Petition for Writ of Certiorari to the United States Supreme Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Respondent's Brief in Opposition have been furnished to Billy E. Lee, Assistant County Attorney, 634 Harris County Administration Building, Houston, Texas 77002, by certified mail, return receipt requested, on this the 16th day of February, 1981.

J. PATRICK WISEMAN